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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 488

UNITED STATES, APPELLANT,

VS.

RAYMOND J. WISE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

FILED OCTOBER 10, 1961

JURISDICTION NOTED DECEMBER 18, 1961

SUPREME COURT OF THE UNITED STATES

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No. 488

UNITED STATES, APPELLANT,

vs.

RAYMOND J. WISE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

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[fol. 1]

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSISSIPPI, WESTERN
DIVISION**

Criminal Action No. 20542

(15 U.S.C. §§ 1 and 13a)

[Returned Sept. 16, 1959]

UNITED STATES OF AMERICA,

vs.

NATIONAL DAIRY PRODUCTS CORPORATION AND
RAYMOND J. WISE

INDICTMENT—Sept. 16, 1959

The grand jury charges:

Count One

The Defendant

1. National Dairy Products Corporation (hereinafter referred to as "National") is hereby indicted and made a defendant herein. National is a corporation organized and existing under the laws of the State of Delaware, with its executive offices in New York, New York. It is engaged in the business of purchasing, processing, distributing, and selling milk and other dairy products throughout the United States. Prior to December 1, 1956, National conducted its milk operations in the Missouri-Kansas area through its wholly owned subsidiary, the Chapman Dairy Company, a Delaware corporation.

2. The acts alleged in this indictment to have been done by National were authorized, ordered, or done by the officers, directors, employees, or agents thereof.

* * * * *

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[fol. 2]

Definitions

4. Whenever used in this indictment, the term:

- (a) "Milk" means cow's milk produced for sale for human consumption in fluid form as whole milk regardless of its butterfat content and milk by-products such as cottage cheese and sour cream.
 - (b) "Distributor" means any person, firm, or corporation engaged in the business of purchasing milk from National at its bottling plant in Kansas City, Missouri, for resale to the distributor's customers.
 - (c) "Greater Kansas City market" means the counties of Jackson and Clay in Missouri and Wyandotte and Johnson in Kansas.
 - (d) "Missouri-Kansas area" means those markets in Kansas and Missouri in which milk bottled in National's Kansas City, Missouri plant is sold and distributed. Said area embraces both the Greater Kansas City market and the markets in which such milk is sold by distributors.
 - (d) "Paola-Osawatomie, Kansas market" means the territory in which distributor Merle Martin sells milk purchased from National.
 - (f) "Sedalia, Missouri market" means the territory in which distributor Raymond Newton sold milk purchased from National during the period from about January 1, 1957 through October 1958.
 - (g) "Lexington, Missouri market" means the territory in which distributor Chester Heyer sells milk purchased from National.
 - (h) "Mexico, Missouri market" means the territory in which distributor Dick Isaacs sells milk purchased from National.
- [fol. 3] (i) "Glasgow, Missouri market" means the territory in which distributor Paul Craig sells milk purchased from National.
- (j) "Butler, Missouri market" means the territory, including the town of Archie, Missouri, in which distributor Clifford Clark sells milk purchased from National.
 - (k) "Out-of-State dairy" means any corporation

other than National bottling and selling milk in the Greater Kansas City market whose milk is also regularly sold outside the States of Missouri and Kansas.

- (d) "Small dairy" means any corporation, partnership, person, or persons bottling milk exclusively in Missouri or Kansas and whose sales are usually confined within a radius of forty or fifty miles of its bottling plant.
- (m) "In-store milk price" means the price at which milk is sold to stores by a distributor.

Nature of Trade and Commerce

5. The defendant National is the largest dairy corporation in the world. Its world-wide activities embrace four continents. In each of the years 1957 and 1958, National's sales in the United States and Canada alone totalled approximately one billion, five hundred million dollars, with net profits after taxes of approximately fifty million dollars. National closed the year 1958 with current assets of over two hundred and seventy-five million dollars and total assets of over five hundred and fifty-five million dollars. It has approximately fifty thousand employees. National's operations in the United States are broken down into six operating divisions, including the Sealtest Division, Kraft Foods Division, and four other divisions in related fields. Each of these divisions likewise has its own geographical operating divisions.

[fol. 4] 6. The Sealtest Division conducts numerous milk, milk by-products, and ice cream processing and distributing operations through seven of its own geographical operating divisions. The Sealtest-Central Division is responsible for Sealtest operations in the area generally considered as the midwestern United States, with head offices in Chicago, Illinois. The operations of the Kansas City, Missouri plant of National are under the direction of the Sealtest Central Division.

7. For the past several years National has competed in the Missouri-Kansas area with a number of out-of-State dairies and small dairies. The out-of-State dairies are national concerns which regularly sell milk in a number of sections of the United States, including the States of Mis-

Missouri and Kansas. Each of the small dairies that competes with National and its distributors in the Missouri-Kansas area has only one bottling plant and is, in many instances, family-owned and operated. The annual sales of these small dairies usually do not exceed \$300,000. Many of these small dairies have annual sales of less than \$100,000 and net assets of less than \$50,000.

8. National's plant in Kansas City, Missouri has used two methods of distributing milk in the Missouri-Kansas area. The first method has been the sale of milk through its own employee drivers directly to stores and home delivery customers. This system has been employed primarily in the Greater Kansas City market. The other method has been the sale of milk in paper carton containers to independent distributors who in turn resell such milk to their own customers, using their own trucks, and their own warehousing and refrigerating facilities. These distributors conduct their business for their own account and profit. Sales through distributors have been made in numerous cities and towns in Kansas and Missouri, for the most part outside of the Greater Kansas City market but within the Missouri-Kansas area.

[fol. 5] 9. During the period covered by this count of this indictment, National's Kansas City, Missouri plant has not normally bottled milk in glass containers for sale to stores. The milk which has been bottled in paper carton containers in National's Kansas City, Missouri plant has been sold and distributed throughout the Missouri-Kansas area. A substantial portion of the milk thus bottled and sold and distributed throughout the Missouri-Kansas area was originally obtained from farms located in Kansas. Likewise substantial portions of the milk bottled in National's Kansas City, Missouri plant and originally produced on farms in Missouri have been sold and distributed in the Kansas portion of said area. Similarly, numerous competitors of National doing business in the Missouri-Kansas area have secured their milk from producers located in a State or States other than the State in which such milk has been sold or distributed.

10. National has distributorship agreements with various distributors doing business in the States of Missouri and Kansas. Among the distributors having such agreements

with National and purchasing their milk from National's plant in Kansas City, Missouri are Chester Hoyer, distributor for the Lexington, Missouri market; Raymond Newton, distributor for the Sedalia, Missouri market during the period January 1957 through approximately October 1958; Paul Craig, distributor for the Glasgow, Missouri market; Andrain County Dairy, distributor for the Mexico, Missouri market; Merle Martin, distributor for the Paola-Osawatomie, Kansas market; and Clifford Clark, distributor for the Butler, Missouri market. Under said agreements, these distributors have purchased milk from National for resale to their own wholesale and retail customers in their respective markets. These distributors are independent businessmen engaged in purchasing milk and reselling it on their own account for profit. They employ their own personnel, extend their own credit, and own their own trucks and storage facilities.

[fol. 6] 11. During the past several years, a substantial portion of the milk sold by said distributors has been purchased by National from a cooperative or cooperatives obtaining milk from producers located in the States of Kansas and Missouri. The milk produced on farms located in these two States has usually been commingled by the cooperatives and then delivered to National's plant in Kansas City, Missouri where it has been bottled by National. After the milk has been bottled it has, in most instances, been delivered to said distributors by a trucking firm employed by National. A substantial part of such sales and deliveries has been pursuant to price orders placed by the distributors for the purpose of supplying their regular customers and to provide for other anticipated demands. In filling such orders, National has deliveries made regularly to its distributors located in Missouri three or four times each week. Thus, there has been a regular substantial, and continuous flow of milk in interstate commerce from producers in Kansas to distributors selling milk in the State of Missouri. Three or four times each week, for the past several years, distributor Merle Martin has obtained milk from National directly from National's plant in Kansas City, Missouri, and then transported said milk in his own truck into the Paola-Osawatomie, Kansas market, where it has been sold to his customers in that market.

12. During the past several years, substantial amounts of milk sold in markets such as the Lexington, Missouri market, the Sedalia, Missouri market, the Mexico, Missouri market, the Glasgow, Missouri market, and the Butler, Missouri market have come from or have been commingled with milk coming from farms located in the State of Kansas. Likewise, substantial amounts of milk sold in the Paola-Osawatomie, Kansas market have come from or have been commingled with milk coming from farms located in the State of Missouri.

[fol. 7-24] 13. Most of the glass gallon containers and a substantial portion of the paper carton containers used to bottle milk sold in the above-named Missouri markets have come from States other than the State of Missouri.

14. Milk is a perishable commodity and can only be stored in fluid form for a relatively short time prior to its sale and consumption. Accordingly, it must reach the consumer within a short time after its production.

15. Therefore, there has been from day to day a continuous flow of milk in interstate commerce from producers in the States of Kansas and Missouri to the defendant's plant in Kansas City, Missouri, where it is bottled and then transported to distributors, stores, and consumers in the States of Kansas and Missouri, and all within a relatively short period of time.

[fol. 25]

Count Eleven

74. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-defendant

75. Raymond J. Wise (hereinafter referred to as "Wise"), whose business address is 75 East Wacker Drive, Chicago, Illinois, is hereby indicted and made a defendant in this count of this indictment. Defendant Wise, during all of the period covered by this count of this indictment, has been a vice president and director of National and

has been within said period and within the last five years actively engaged in the management, direction, and control of the affairs, policies, and acts of National, and has authorized or ordered to be done some or all of the acts alleged in this count of this indictment to have been done by National.

The Co-conspirators

76. All out-of-State dairies, doing business in the Greater Kansas City market and having their principal executive offices located outside the States of Missouri and Kansas, [fol. 26] and their officers and agents are not named as defendants herein but participated as co-conspirators with the defendants in the offense hereinafter charged, and have performed acts and made statements in furtherance thereof.

Offense Charged—Sherman Act

77. Beginning in or about September 1957 and continuing until some time in October of 1957, the exact dates being to the grand jurors unknown, the defendants National and Wise, the co-conspirators, and other persons to the grand jurors unknown, engaged in a combination and conspiracy to eliminate price competition in the sale of milk in the Greater Kansas City market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

78. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among the defendants, the co-conspirators, and others to the grand jurors unknown, the substantial terms of which were that they agree:

(a) To hold meetings in Chicago, Illinois and Kansas City, Missouri, to discuss ways and means to:

(1) Require the Meyer Sanitary Milk Company to withdraw a certain discount it had offered on or about August 1, 1957 to Milgram Food Stores, one of the largest grocery chains in the Kansas City market; and

- (2) Require the small dairies selling milk in glass gallon containers to narrow the price differential between milk sold in such containers and milk sold in paper cartons.
- [fol. 27] (b) To start a milk price war on or about September 13, 1957 by substantially depressing milk prices;
- (c) To limit the milk price war to the Greater Kansas City market;
 - (d) To increase their milk prices on or about October 10, 1957 to levels above those prevailing in the Greater Kansas City market prior to September 13, 1957; and
 - (e) To induce and coerce small dairies selling milk in glass gallon containers to raise their prices on or about October 10, 1957.

79. During the period of time covered by this count of this indictment and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and their co-conspirators have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

80. The effects of the aforesaid offense, among others have been:

- (a) To increase the selling price of milk sold in the Greater Kansas City market in glass gallon containers;
- (b) To restrict the sale of milk in glass gallon containers in the Greater Kansas City market;
- (c) To cause small dairies to sell milk at a loss;
- (d) To cause small dairies to sustain severe financial losses; and
- (e) To raise milk prices higher than those prevailing before the aforesaid combination and conspiracy.

[fol. 28]

Jurisdiction and Venue

81. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendants and the co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

Count Twelve

82. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-defendant

83. Raymond J. Wise (hereinafter referred to as 'Wise'), whose business address is 75 East Wacker Drive, Chicago, Illinois, is hereby indicted and made a defendant in this count of this indictment. Defendant Wise, during all of the period covered by this count of this indictment, has been a vice president and director of National and has been within said period and within the last five years actively engaged in the management, direction, and control of the affairs, policies, and acts of National, and has authorized or ordered to be done some or all of the acts alleged in this count of this indictment to have been done by National.

The Co-conspirators

84. All out-of-State dairies, doing business in the Greater Kansas City market and having their principal executive [fol. 29] offices located outside the States of Missouri and Kansas, and their officers and agents are not made defendants herein but participated as co-conspirators with the defendants in the offense hereinafter charged and have performed acts and made statements in furtherance thereof.

Offense Charged—Sherman Act

85. Beginning in or about June 1958 and continuing until about October 1958, the exact dates being to the grand jurors unknown, the defendants National and Wise, the co-conspirators, and other persons to the grand jurors unknown, engaged in a combination and conspiracy to eliminate price competition in the sale of milk in the Greater Kansas City market in unreasonable restraint of the aforesaid interstate trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

86. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among the defendants, the co-conspirators, and others to the grand jurors unknown, the substantial terms of which were that they agree:

- (a) To hold meetings to devise plans for depressing, stabilizing, and increasing milk prices in the Greater Kansas City market;
- (b) To follow a plan for depressing, stabilizing, and increasing milk prices by:
 - (1) Lowering prices on or about July 14, 1958;
 - (2) Raising prices on or about August 27, 1958;
 - (3) Raising prices again on or about October 1, 1958;
- (c) To induce and coerce small dairies selling milk in glass gallon containers to raise their prices.

[fols. 30-35] 87. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and their co-conspirators have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

88. The effects of the aforesaid offense, among others, have been:

- (a) To increase the selling price of milk sold in the Greater Kansas City market in glass gallon containers;
- (b) To restrict the sale of milk in glass gallon containers in the Greater Kansas City market;
- (c) To cause small dairies to sell milk at a loss;
- (d) To cause small dairies to sustain severe financial losses; and
- (e) To raise milk prices higher than those prevailing before the aforesaid combination and conspiracy.

Jurisdiction and Venue

89. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendants and the co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

[fol. 26] Dated: September 16, 1959

A True Bill: (s) McKinley Wooden Foreman. (s) Robert A. Bicks, Acting Assistant Attorney General. (s) Charles L. Whittinghill, Attorney, Department of Justice. (s) Edward L. Scheufler, United States Attorney. (s) Earl A. Jinkinson, (s) James E. Mann, (s) Robert L. Eisen, Attorneys, Department of Justice. Room 404, United States Courthouse, Chicago 4, Illinois, WEBster 9-2395.

[fols. 37-38] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

MOTION OF DEFENDANT **RAYMOND J. WISE** FOR PARTICULARS
OF CERTAIN ALLEGATIONS OF THE INDICTMENT—Filed January 22, 1960.

[fol. 39]

III

Defendant, **Raymond J. Wise**, moves the Court for an order directing the United States of America to serve on said defendant and to file with the Court a bill of particulars, to the extent that said particulars are now known to the United States, of certain allegations of the indictment.

3. As to paragraph 2 of the indictment as the same is realleged in paragraph 74 of Count Eleven and paragraph [fols. 40-42] 82 of Count Twelve, as to paragraph 75 of Count Eleven, as to paragraph 83 of Count Twelve, and, in the alternative, if his motions I A and I B to dismiss Count Thirteen (p. 31) are denied, as to paragraph 2 of the indictment as the same is realleged in paragraph 90 of Count Thirteen, and as to paragraph 91 of Count Thirteen, state whether defendant, **Raymond J. Wise**, is alleged to have participated in the offense charged other than as a director, officer, or agent who has authorized, ordered or done any of the acts constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent. If so, specify (1) each act claimed to have been done by defendant, **Raymond J. Wise**, in his alleged participation in the offense charged which was not done by said defendant as a director, officer, or agent authorizing, ordering, or doing any act constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent; and (2) the date and place of each of such acts.

In support of these motions, defendant, Raymond J. Wise, offers his attached Suggestions of applicable authorities.

January 22, 1960.

Respectfully submitted, John T. Chadwell, Richard W. McLaren, Henry W. Buck, William H. Hoffstot, Jr., Attorneys for Defendant, Raymond J. Wise.

Of Counsel: Snyder, Chadwell, Keck, Kayser & Ruggles, 135 S. La Salle St., Chicago 3, Ill., Telephone: RAndolph 6-2545. Morrison, Hecker, Buck & Cozad, Seventeenth Fl. Bryant Bldg., Kansas City 6, Missouri, Telephone: VICTOR 2-5910.

Copy of the foregoing Motions of Defendant Raymond J. Wise mailed to Earl A. Jinkinson, Attorney for the United States, 219 S. Clark St., Chicago 4, Illinois, this 22nd day of January, 1960.

Henry W. Buck, Attorney for Defendant Raymond J. Wise.

[fol. 43] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO THE
MOTION OF DEFENDANT RAYMOND J. WISE TO DISMISS
COUNTS ELEVEN AND TWELVE OF THE INDICTMENT AS TO
HIM—Filed September 19, 1960.

[fols. 44-46] This motion should fail not only because it is filed eight months after the time set by the Court for the filing of all motions, but also because it is completely without merit.

A mere reading of Counts Eleven and Twelve of the indictment shows that the defendant Wise was indicted as

an individual. Paragraphs 75 (Count Eleven) and 83 (Count Twelve) of the indictment specifically name Raymond J. Wise as an individual defendant and then describe his position with National. Furthermore, Section 14 of the Clayton Act is not mentioned in either of these counts, nor for that matter is Section 14 of the Clayton Act ever mentioned anywhere in the indictment.

The charging paragraphs of each of these counts specifically charge Wise with entering into a conspiracy with National and others to fix prices. These paragraphs read in part as follows:

... the defendants National and Wise, the co-conspirators, and other persons to the grand jurors unknown, engaged in a combination and conspiracy to eliminate price competition.

[fol. 47] Earl A. Jinkinson, James E. Mann, Robert L. Eisen, Attorneys, Department of Justice, Room 404, United States Courthouse, Chicago 4, Illinois, Webster 9-2395.

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

SUPPLEMENTAL MOTION OF DEFENDANT RAYMOND J. WISE FOR
PARTICULARS OF CERTAIN ALLEGATIONS OF COUNTS ELEVEN
AND TWELVE OF THE INDICTMENT—Filed January 24, 1961

Defendant, Raymond J. Wise, pursuant to leave granted, moves the Court for an order directing the United States of America to serve on said defendant and to file with the Court a bill of particulars concerning certain allegations of Counts Eleven and Twelve of the indictment.

Defendant requests particulars as to the following matters:

1. As to paragraphs 75 and 77 of Count Eleven and as to paragraphs 83 and 85 of Count Twelve; state whether defendant Raymond J. Wise is alleged to have participated in the offenses charged:

(a) as an individual acting for his own personal account. If so, specify each act claimed to have been done by defendant Raymond J. Wise, in his alleged participation in the offense charged which was for his own personal account and not as a director, officer, or agent authorizing, ordering or doing any act constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent.

[fol. 49] (b) in any capacity other than as a director, officer, or agent who has authorized, ordered or done any of the acts constituting in whole or in part the violations alleged to have been committed by the corporation of which he was a director, officer or agent. If so, specify each act claimed to have been done by defendant, Raymond J. Wise, in his alleged participation in the offense charged which was not done by said defendant as a director, officer, or agent authorizing, ordering, or doing any act constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent.

2. State each section of the United States Statutes which defendant Raymond J. Wise is charged with having violated.

In support of the foregoing motion defendant, Raymond J. Wise, offers his attached Suggestions of applicable authorities.

Dated: January 24, 1961.

John H. Lashly, John T. Chadwell, Martin J. Purcell,
Richard W. McLaren, Attorneys for Defendant,
Raymond J. Wise.

Of Counsel: Lashly, Lashly & Miller 705 Olive Street, St. Louis 1, Missouri, Tel: MAin 1-2939. Snyder, Chadwell, Keck, Kayser & Ruggles, 135 So. La Salle St., Chicago 3, Illinois, Tel: RA 6-2545. Morrison, Hecker, Buck & Cozad, 17th Floor, Bryant Bldg. Kansas City 6, Missouri, Tel: VI 2-5910.

[fol. 49a] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI, WESTERN DIVISION

MOTION OF DEFENDANT RAYMOND J. WISE TO DISMISS COUNTS
ELEVEN AND TWELVE OF THE INDICTMENT AS TO HIM—Filed
January 24, 1961

Defendant, Raymond J. Wise, pursuant to leave of Court, moves that Counts Eleven and Twelve of the indictment be dismissed as to him because they fail to charge him with an offense under Section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1.

In support of said motion, defendant, Raymond J. Wise, offers his attached Suggestions.

Dated: January 24, 1961.

John H. Lashly, John T. Chadwell, Martin J. Purcell,
Richard W. McLaren, Attorneys for Defendant,
Raymond J. Wise.

Of Counsel: Lashly, Lashly & Miller, 705 Olive Street, St. Louis 1, Missouri, Tel: MAin 1-2939. Snyder, Chadwell, Keck, Kayser & Ruggles, 135 South La Salle St., Chicago 3, Illinois, Tel: RA 6-2545. Morrison, Hecker, Buck & Cozad, 17th Floor, Bryant Building, Kansas City 6, Missouri, Tel: VI 2-5910.

[fol. 49b] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

SUGGESTIONS OF DEFENDANT RAYMOND J. WISE IN SUPPORT
OF SUPPLEMENTARY MOTION FOR PARTICULARS OF CERTAIN
ALLEGATIONS OF COUNTS ELEVEN AND TWELVE OF THE IN-
DICTMENT—Filed January 24, 1961

The defendant, Raymond J. Wise, has filed a supplemental motion for particulars which would clarify the fact that he is not charged with violating Section 1 of the Sherman Act because of conduct in which he engaged as an individual acting for his own account, but solely because of acts performed as a representative of defendant National Dairy Products Corporation.

- I. The Allegations of Counts Eleven and Twelve of the Indictment Appear to Charge Defendant Wise Solely With Respect to Acts Performed in a Representative Capacity and the Requested Particulars Should be Granted in Connection With This Defendant's Motion to Dismiss for Failure to Charge an Offense.

Paragraphs 75 and 83 of the indictment identify Wise as one who "... during all of the period covered [by Counts Eleven and Twelve] has been a vice president and director of National and ... **actively engaged in the management, direction and control of the affairs, policies, and acts of National** ...". These paragraphs go on to state, as the reason why Wise has been named as a defendant, that he "authorized or ordered to be done some or all of the acts alleged ... to have been done by National."

[fol. 49c] Paragraphs 77 and 85 of the indictment contain the ambiguous charge that "... the defendants National and Wise, the co-conspirators [out-of-State dairies], and other persons to the grand jurors unknown, engaged in a combination and conspiracy to eliminate price competition ...". This charge is ambiguous because, under the law, an officer acting within the scope of his employ-

ment cannot conspire with his corporate employer. See *e.g. Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F. 2d 911 (5 Cir. 1952), *cert. denied* 345 U.S. 925 (1953); *Goldlaur, Inc. v. Schubert*, 169 F. Supp. 677 (E.D Pa. 1958); *Marion County Co-op Assn. v. Carnation Co.*, 114 F. Supp. 58 (W.D. Ark. 1953). In order to make any sense, therefore, this allegation must mean either that Wise is charged as an individual, acting on his own behalf and outside the scope of his employment by defendant National, or that he is charged as a defendant on account of acts performed as a representative of defendant National. We are confident that the Government does not contend—and in fact would vigorously deny—that defendant Wise acted outside the scope of his employment by National.

Accordingly, if the Government is required to furnish the particulars asked in this motion we believe that it will be forced to admit that

(1) Defendant Wise is not claimed to have participated in the offenses charged as an individual acting for his own personal account;

(2) While defendant Wise is personally charged with engaging in the illegal conduct charged in the indictment, he is alleged to have been acting solely as an officer, director or agent who authorized, ordered [fol. 49d] or did acts constituting in whole or in part the violations alleged to have been committed by defendant National;

(3) Defendant Wise is charged only with having violated Section 1 of the Sherman Act, 15 U.S.C. § 1.

This being so, defendant Wise contends that Counts Eleven and Twelve of the indictment fail to charge him with an offense because Section 1 of the Sherman Act does not impose criminal responsibility upon corporate officials charged only with authorizing, ordering or doing corporate acts constituting a corporate violation. To the contrary, the prosecution of corporate officials for such acts is governed by Section 14 of the Clayton Act, 15 U.S.C. § 24. It is that section, as we shall show, that creates and defines a separate offense under which officers, directors and agents of a corporation, who have authorized, ordered or done

the acts constituting a violation of the antitrust laws by the corporation, are held responsible, and it is that section that specifies the criminal penalties applicable to such officials.

[fol. 49e] Dated: January 24, 1961.

Respectfully submitted, John H. Lashly, John T. Chadwell, Martin J. Purcell, Richard W. McLaren, Attorneys for Defendant, Raymond J. Wise.

Of Counsel: Lashly, Lashly & Miller, 705 Olive St., St. Louis 1, Missouri, Tel: MAin 1-2939. Snyder, Chadwell, Keck, Kayser & Ruggles, 135 So. La Salle St. Chicago 3, Illinois, Tel: RA 6-2545. Morrison, Hecker, Buck & Cozad, 17th Floor, Bryant Building, Kansas City 6, Missouri, Tel: VI 2-5910.

[fol. 50] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

ORDER—Filed March 17, 1961

This matter coming on to be heard upon motions of defendants for particulars of certain allegations of the indictment, and upon consideration of suggestions filed on behalf of defendants and countersuggestions filed by the attorneys for the United States, and oral arguments having been heard, and the Court being advised in the premises,

It is Hereby Ordered:

I

1. Paragraph 1 of the supplemental motion of defendant Raymond J. Wise for particulars of certain allegations of Counts Eleven and Twelve is sustained. As to paragraphs 75 and 77 of Count Eleven and as to paragraphs 83 and 85 of Count Twelve, the United States shall state

whether defendant Wise is alleged to have participated in the offenses charged:

(a) as an individual acting for his own personal account. If so, specify each act claimed to have been done by defendant Raymond J. Wise in his alleged participation in the offense charged which was for his own personal account and not as a director, officer, or agent authorizing, ordering or doing any act constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent.

(b) in any capacity other than as a director, officer, or agent who has authorized, ordered or done any of the acts constituting in whole or in part the violations alleged to have been committed by the corporation of which he was a director, officer or agent. If so, specify each act claimed to have been done by defendant, Raymond J. Wise, in his alleged participation in the offense charged which was not done by said defendant as a director, officer, or agent authorizing, ordering, or doing any act constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent.

2. Paragraph 2 of said supplemental motion of defendant Wise for particulars is denied.

* * * * *

R. Jasper Smith, Judge.

[fol. 55] Entered at Kansas City, Missouri, this — day of March, 1961.

Approved as to form: John T. Chadwell, Attorney for defendants, National Dairy Products, Corporation and Raymond J. Wise, 135 So. LaSalle Street, Chicago 3, Illinois.

Approved as to form: Earl A. Jinkinson, Attorney, Department of Justice, Room 404, United States Court House, Chicago 4, Illinois.

[fol. 56] IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

No. 29542 Criminal

UNITED STATES OF AMERICA, Plaintiff,

VS.

NATIONAL DAIRY PRODUCTS CORPORATION AND RAYMOND J.
WISB, Defendants

**Transcript of Proceedings on Hearing Arguments on
Sundry Motions—March 6, 1961**

APPEARANCES:

Hon. R. Jasper Smith, Judge, Presiding.

For Government: Earl A. Jinkinson, Chief, James Edward Mann, Robert L. Eisen, Trial Attorneys, Department of Justice, Room 404, 219 South Clark St., Chicago 4, Illinois.

For Defendants: John T. Chadwell, Snyder, Chadwell, Keck, Kayser and Ruggles, 135 South LaSalle St., Chicago 3, Illinois. John H. Lashly, Lashly, Lashly & Miller, 705 [fol. 57] Olive Street, St. Louis 1, Missouri. Martin J. Purcell, Richard W. McLaren, Morrison, Hecker, Buck & Cozad, 17th Floor Bryant Building, Kansas City 6, Missouri.

Elsa A. Ripley, Official Reporter.

Be it Remembered that on this 6th day of March, A. D. 1961, arguments on sundry motions heretofore filed herein coming on for hearing before the Honorable R. Jasper Smith, Judge of the United States District Court for the Western District of Missouri, sitting in the Western Division thereof, and the parties appearing in person and/or by counsel as hereinbefore set forth, the following proceedings were had:

The Court: I am not at all certain that there is any particular occasion to have a formal session on this, although I think probably we might dispose of a number of these matters on the basis of a bench ruling, and then, perhaps a little later on, retire to the library where we can be a little bit informal about it and work out the rest of it.

.

[fol. 58] **RULINGS BY COURT ON DEFENDANT RAYMOND J. WISE'S MOTION TO DISMISS COUNTS ELEVEN AND TWELVE; AND ON SUPPLEMENTARY MOTION FOR PARTICULARS, COUNTS ELEVEN AND TWELVE**

Now, I can rule some of these others matters, I think, fairly quickly and in reverse order in the filings that have been done.

The motion of defendant Wise to dismiss Counts Eleven and Twelve will be overruled at this time. I have some serious doubts as to whether those two counts state a cause of action against Wise under the Sherman Act. I think the nature of the allegations that are contained in the Indictment are strongly indicative that the remedy is, in fact, predicated on Section 14 of Clayton, but at this time, in the absence of particulars, I think there is some doubt in connection with it. So the motion to dismiss will be overruled.

However, as a corollary to that, the supplementary motion of the defendant Wise for particulars on certain allegations on Counts Eleven and Twelve will be sustained substantially in their entirety. Now, I say "substantially [fol. 59] in their entirety" because I think when we get back to the relative informality of Chambers discussion, we ought to go over those in detail, because some of them are a little bit - I would say that the vice of the motion, the motion for particulars, as far as Wise is concerned, carries over from the motion in other respects where you get down too much into evidence detail, and I think it is important that that not be into evidence detail but simply a specification to show clearly that the action is directed to the Sherman Act activities as distinguished from the Clayton Act representative responsibility for the personal liability of the officers.

[fol. 60] The Court: Let me make this observation. I am talking now in particular about the supplemental motion of the defendant Wise for particulars as to Counts Eleven and Twelve. Now, that is not for the purpose of affording information to the defendant, as I view it, but it is for the purpose of determining what is charged, so

that there can or cannot be a possible basis for a motion to dismiss on the theory that he is not properly charged under the Sherman Act individually. Now, that is what I want you to get into right after lunch, if you will, because that one bothers me quite considerably. I think it is a troublesome legal question. I am not at all convinced that the aiding and abetting statute is of any help to you at all in that sort of a situation. I think you have to consider whether or not he is charged as an individual, which would be individually responsible under the Sherman Act, or whether he is as an officer of the corporation under Fourteen of the Clayton Act.

[fol. 61] Mr. Mann: Mr. Jinkinson was going to argue that legal question, and likely this afternoon he will do it.

The Court: That is what I am concerned with and I think it demands some sort of a bill of particulars in order to clarify it.

Let's be in recess until two o'clock, Gentlemen.

(Court thereupon stood at recess at 12:55 o'clock p. m. until 2:00 o'clock p. m., at which time proceedings were resumed and continued as follows:)

ARGUMENT BY MR. JINKINSON ON QUESTION OF BILL OF PARTICULARS

Mr. Earl A. Jinkinson: Your Honor raises the question as to the motion by the individual Wise for a bill of particulars in connection with charges One and Twelve of the Indictment. What I want to say at the outset preliminarily is, that counsel has attempted to lead the Court into what I say is a mistaken impression that this is a case of first impression. Quite the contrary. The question of whether or not an individual is indicted under the Sherman Act, under Section 14 of the Clayton Act, has been raised on many occasions. It comes about because of a motion made by the defendants that there is a duplicity, of avowal in the individual defendant being indicted. The individual defendant says, "I can't tell you under which Act I am indicted." The only thing that is novel about the particular [fol. 62] charge of Wise is that Congress in 1955 amended the Sherman Act to increase the fine to \$50,000. But the point of whether he is indicted individually or whether he

is indicted as an officer of the Company, there is nothing to it.

So I say, Your Honor, we then come to the cases. In this respect let me say, while we didn't have the advantage of a brief filed by the Government in a case now pending in the Northern District of Illinois, *U. S. v. Natural Gas Company, et al*, in which the identical question was raised by Mr. Chadwell in that case. Well, our contention is this, that a reading of the indictment would fairly lead them to believe that Wise is charged as having violated Section One of the Sherman Act and, therefore, he is indicted as an individual and as doing the things charged in the Indictment as an individual. There can be no other fair reading of the Indictment. The mere fact that the Indictment contains some language which may have been lifted, maybe not in context but similar to language in Section Fourteen of the Clayton Act doesn't in any manner detract from the fact that the Indictment fairly states that he is indicted for violating Section One of the Sherman Act, not Section Fourteen of the Clayton Act.

[fol. 63] The defendants would like this Court to believe that Section 14 of the Sherman Act has, in some manner, repealed Section 1 of the Sherman Act. Quite the contrary, Your Honor. It hasn't repealed any of the Sherman Act. It has only added to anti-trust enforcement, but it has not repealed Section 1 of the Sherman Act.

There were several cases decided prior to Section 14 on this very point of what the individual is being charged with. I call the Court's attention to *U. S. v. McAndrews and Forbes Company*, 149 Fed. 823; appeal dismissed, 212 U. S. 585. The District Court of the Southern District of New York overruled the motion to dismiss certain defendants indicted under the Sherman Act although they had been acting solely in their representative capacity. The Court reasoned at 411 in the Opinion:

"When the statute declares that certain acts unlawfully to be accomplished under modern business conditions only through corporate instrumentalities, shall be listed misdemeanors, and further declares that the word 'prison', as used therein, shall be deemed to include corporations, such statute seems to me to be clearly passed in contemplation of the elementary prin-

[fol. 64] ciple that with respect to a misdemeanor all those who personally aid or abet in its commission are indictable as principals. I am compelled to the conclusion that under this statute that the officer or agent of a corporation charged with fault, be also charged with personal participation, direction or activities therein, both may be so charged in the same indictment."

To similar effect is *U. S. v. Winslow*, 195 Sup. 578, affirmed 227 U. S. 262. I shall not read from that book but it is to the same effect.

U. S. v. Swift, 188 Fed. 92, Northern District of Illinois, the Court said:

"The answer to this is found"—that is, the action to the Court's dismissal of defendant's objection to the sufficiency of the indictment—"The answer to this is found in the indictment, which charges not that the corporation, but that the group of individual defendants, did what was alleged to be unlawful; and further, that the defendants managed and controlled the various corporations, and directed the corporate action. More was not necessary."—Under the Sherman Act.

Now, Your Honor, let's stop for a minute and just look [fol. 65] very briefly at the legislative history of Section 14, and to buttress my contention that Section 14 of the Clayton Act did not repeal any part of the Sherman Act, was only passed to aid the enforcement of it, I read from some of the colloquy on the House floor between Representatives Floyd and Cooper:

"Mr. Cooper: The title of this Act, 'An act to supplement existing unlawful laws against unlawful restraint and monopolies, and for other purposes.' If I understand the gentleman, it is his contention, in supporting this Conference report, that the criminal clauses of the Sherman Law are still in force and that this Act simply supplements them?

"Mr. Floyd: Certainly; that is correct.

"Mr. Cooper: And that those criminal clauses are not repealed?

"Mr. Floyd: They are not repealed in any sense, and I thank the gentleman for asking the question."

In short, Your Honor, Section 14 was merely passed to reach those offenders who might possibly order something done and then not actually do it themselves. It is very conceivable that the President of, well we will say National Dairies, faced with a situation in Mexico, Missouri, he might just pick up the phone and tell his assistant, "I want [fol. 66] you to straighten that mess out and get in Mexico, Missouri. I don't care how you do it, but get it straightened out." Now, he didn't actually participate in anything, but he ordered it done. Now, this Section 14 was passed to reach a man like that and it never was intended to repeal Section 1 of the Act.

Now, in counsel's brief they cite a colloquy between Senator Kenyon and Senator Culbertson as supporting their contention that Section 14 supersedes Section 1 of the Act, and that Wise should be indicted under Section 14 of this Act, or at least it should be so held. Now, I want to read that, because we cite it also in our brief. Let's see what happened.

Mr. Kenyon said, "The Senator does not claim that Section 1 of the Sherman Act does not penalize the individual."

He answered. That was a very clever answer but he never did answer the question.

Mr. Culbertson said: "What I mean to say is this:— heretofore under the Sherman Act, if a corporation was guilty of a violation of that Act, the guilt of that corporation would not be visited upon the individual director, or agent, or officer, who authorized or committed or induced the act. This Section is intended [fol. 67] to supply that deficiency, or to visit upon the officers or agents of the corporation responsible for the conduct, punishment for the act of the corporation."

But the Government never answered Senator Kenyon's question, and he didn't contend that Section 1, that is the individual penalties are repealed in Section 1 of the Act.

Now, in this case, the instant case in this indictment, it

is alleged that Mr. Wise did the things, alleged in this Indictment. That is, he individually, personally, attended meetings; he conspired with both National and other co-defendants, who are not indicted, or co-conspirators not indicted, and I say to this Court that any fair reading of the Indictment will lead one to believe that he was indicted under Section 1 of the Act and not Section 14 of the Clayton Act, and for that reason there is no necessity for submitting any Bill of Particulars whatever.

REPLY ARGUMENT BY MR. CHADWELL

Mr. Chadwell: May I reply to that, Your Honor? I don't want to proceed—

The Court: Oh, go ahead. Yes.

Mr. Chadwell: Your Honor, there is no question that Mr. Wise was indicted under Section 1 of the Sherman Act and that he was not indicted under Section 14 of the Clayton [fol. 68] Act. There is no question about that. That is precisely our contention. Our complaint is, if what he did was done in his representative capacity, that is, as a director, officer or agent of National Dairies, he should have been indicted not under Section 1 but under Section 14. Now, that is the point, and for Mr. Jinkinson to get up and say over and over again, that he was indicted under Section 1 doesn't solve the problem before this Court.

Now, Mr. Jinkinson says that Wise is charged with personally violating Section 1. It is charged he violated Section 1 of the Sherman Act. But in the Indictment, as Your Honor has of course observed, it is specifically alleged in these two Counts now before us, in Paragraph 75 of Count Eleven and paragraph 83 of Count Twelve, as follows:

"During all the period covered by this Count of this Indictment, Wise has been a Vice-President and Director of National, and has been within said period and within the last five years actively engaged in the management, direction, control of the affairs, policies and acts of National, and has authorized or ordered to be done some or all of the acts alleged."

Now, those words, "authorized or ordered to be done" are the words of Section 14.

[fol. 69] Now, it is our contention that on the basis of this

allegation in 75 and again in 83 that the Court should dismiss this Indictment under Section 1, because since Mr. Wise is there charged with having acted in his representative capacity, he could only be indicted under Section 14 of the Clayton Act. Now, in order to remove any question on the subject, we have asked the Court to direct the Government to file a Bill of Particulars answering the simple question as to whether it is the Government's contention that Mr. Wise at any time that he was acting here, attending meetings, or whatever he is supposed to have done, at any time did he act in any capacity other than as a director, officer or agent of National Dairy, and if so, to specify the acts that he committed other than in his representative capacity.

Now, talking about the Bill of Particulars for just a moment, that we have requested, I call the Court's attention to the fact that this precise question is before Judge Minor in the Gas case in Chicago, as Mr. Jinkinson has stated, and I am representing some of the defendants in that case. Now, there are two questions that have been presented to Judge Minor. The first was whether or not we, in that case, were entitled to a bill of particulars similar [fol. 70] ilar to the Bill which we have requested here, and Judge Minor, over the violent opposition of the Government, ordered the Government to file such a Bill of Particulars. Now, that was done. It isn't pending. That has been decided, as we have said in our Brief.

Now, Judge Minor has not yet decided the motion we filed on the basis of the indictment and the bill of particulars in that case as to whether the indictment could properly have been brought under Section 1, as we charged there, or contended there, as here, that the Section 1 indictment should be dismissed because the indictment, since in that case the individuals were admitted by the bill of particulars and charged in the indictment to have acted only in their representative capacity, the indictment only could have been brought under Section 14. That particular motion which we made, has not been decided by Judge Minor. It has been briefed and hasn't yet been presented orally. He has it on his calendar for oral argument.

Now, Mr. Jinkinson, in arguing the merits as to whether this Section 14 motion is good or bad, assuming that Mr.

Wise was acting only in a representative capacity, does not answer our contention that he should file this Bill of Par-[fol. 71] ticulars, so that question will be cleared up, although it is my earnest contention to the Court that in view of the allegations of Paragraphs 75 and 83, which I stated at the outset of my argument, I believe we are entitled to this dismissal in any event.

Now, Mr. Jinkinson has hurriedly, and I feel sure inadvertently, covered two or three cases here which he has argued to the Court, reach a result contrary to what we are contending for, and they are two or three old cases. One is the Winslow case and one is the Swift case. Now, in both of those cases, which he cited to the Court,—the Winslow case is 195 Fed. 578, and the Swift case is 188 Fed. 92—in both of those cases it was contended and alleged that the individual was acting in his personal capacity, through a corporation which had been organized as a device for carrying out his personal illegal activities.

In the Winslow case, the indictment charged the individual "caused to be organized and took an active part in the organization of a corporation"—I am short-cutting; this is the gist of it—"of a corporation as a device, for their own individual monopolization of the Schumach machinery business." That was Winslow.

Now, in Swift there was a similar allegation in the indictment,—the individuals "carried on, directed and controlled said portions of said industry by the device of and means of and through and in the names of certain corporations" and so forth. An entirely different situation.

Now, I also call the Court's attention to the fact that in the colloquy, which we have quoted in our Brief—I am not going to re-argue the Brief because I know Your Honor has read it carefully—but in that colloquy, here in Chairman Culbertson, Senator Culbertson, who was Chairman of the Committee that put through this Section 14 back in 1914, Section 14 of the Clayton Act, and he expressly made it clear precisely what they were trying to do, and he couldn't have stated it in clearer language, and I am not going to quote it because we have got it in our Brief. And, as I stated to the Court, it seems to me that Congress has recently made clear that they considered the two sections entirely separate and different,—one, in increasing the fine,

the possible maximum fine, under Section 1, provided in Section 1, there is a \$50,000 maximum, and at the same time Section 14 carries a \$5,000,000 maximum. The precise question that is before the Court here didn't have the significance prior to 1955 at the time of that amendment, that [fol. 73] it does today, and so far as I know, if your Honor please, since this amendment in 1955, and prior thereto so far as I know, this precise question as to whether an executive or officer of a corporation, charged individually it is true but having acted only in his representative capacity, as to whether he can be indicted under Section 1 of the Sherman Act, so far as I know this is strictly a question of first impression before Your Honor in this case and before Judge Minor in Chicago in the Gas case. So far as I know that is true, and I do not believe that Mr. Jinkinson has cited any case in his remarks before Your Honor indicating to the contrary.

Those cases, which I have mentioned, are entirely different cases. The acts which were alleged were in the individual capacity, for individual purposes and businesses and the corporations were used merely as a device.

I strongly urge to the Court that if the Court has any question about our right to have this motion granted as to the defendant Wise, Mr. Jinkinson can very easily state this:—is he charging that Mr. Wise acted in any capacity other than his representative capacity, in the words of our motion, and if so, what acts did he do other than as an [fol. 74] officer, director or agent of National Dairy, and I will guarantee to the Court that he won't say that Mr. Wise acted in anywise other than in that capacity because he knows he can't prove it. Mr. Wise had no business of his own; he wasn't down here at any time serving his own business, nor was he an individual operator. Anything that he did, anything that they can prove that he did, legal or illegal, he did it as an officer, director or agent of National Dairy, and that Mr. Jinkinson knows, and he can't evade the issue by saying that he acted individually or acted personally. Of course he did. He was here; he did it.* Mr. Wise walked in the door and attended the meeting. But, in what capacity did he do it? And that is the question before the Court, and I strongly urge to the Court that this is a serious matter for an individual to be in-

dicted in one of these cases, and I think that he is entitled to this protection that the law gives him, and I strongly urge to the Court that both these motions should be granted.

ADDITIONAL ARGUMENT BY MR. JINKINSON

Mr. Jinkinson: If the Court please, I want to be heard briefly. I may not have followed Mr. Chadwell very closely, but I cite to him *U. S. v. Atlantic Commission*, 45 Fed. Supp. 187. Paragraph 10 of that indictment says:

[fol. 75] " * * * any act, deed, or transaction on the part of any corporate defendant, * * * shall be deemed to mean that the officers, agents, and employees of said corporation, and its subsidiaries and affiliates, ordered or did such act, * * * for and on behalf of said corporation while actively engaged in the management, direction, and control of its affairs."

Under Sections 1 and 2 of the Act, defendants demurred on the ground that the indictment was duplicitous in that it alleged the offenses under Section 1 and 2 of the Sherman Act and Section 14 of the Clayton Act despite the fact that Section 14 was not mentioned in the indictment.

And I say that that squarely raises the point that Mr. Chadwell is contending for here. In one instance the fine is now \$50,000 and it used to be Five and Five; now it is Fifty and Five. But I think the thing is squarely raised. I don't see how it could be more squarely raised. And in that case the Court overruled the motion.

Now, there are many cases cited which allege that defendants are indicted in almost the language of Section 14, and they have all been held to charge a violation of Section 1 or 2 of the Sherman Act. I am not going to conflict [fol. 76] time reading these reports, but may I just pass this Brief up to you? It is in another case, but I think covers the identical point. You will find an Appendix listing ten or twelve different cases, in which, for example page 28, the indictment reads as follows:

"The following named individuals are hereby indicted and made defendants herein. Each of said defendants is and has been during the period of time

covered by this indictment, associated with a defendant corporation in the capacity indicated below. Each of such individuals has authorized, ordered, or done some or all of the acts constituting the offense hereinafter charged."

"6. Whenever in this indictment it is alleged that a defendant corporation did or performed any act, deed, or thing, such allegations shall be deemed to mean that such act, deed, or thing was authorized, ordered, or done by an officer, director, employee, or agent thereof, including but not limited to the natural persons named defendants herein, for or on behalf of said defendant corporation while actively engaged in the management, [fol. 77] direction, and control of its affairs."

Now, as Your Honor said this morning, the Government is not going to get any comfort out of Title 18, Section 2. I submit, Your Honor, that I think that the Dallas case is controlling on the point counsel raises, because after all, as the Supreme Court said, 320 U.S. 277, p. 281:

"The only way that a corporation can act is through individuals, who act on its behalf, and the historic conception of a misdemeanor makes all responsible for it (the misdemeanor) equally guilty."

a doctrine given general application in Fed. 18, Sec. 244.

Now, there are a number of cases holding that an individual may be held criminally liable for acts done in corporation business. U.S. v. Colosse Cheese and Butter Co., 133 Fed. Supp. 953, Northern District of New York. The Court stated at page 955:

"It is also well settled that corporate agents may be held criminally liable for acts done on behalf of the corporation."

So I say to Your Honor, I don't understand how the Government can separate Mr. Wise from his corporate capacity as the Vice-President of National Dairy Company as separate from his own individual self. It is impossible [fol. 78] to divide a man that way; say, this part is Mr.

Wise; this part is National Dairy. If he acts on the part of the corporation, he is just as equally criminally liable in his individual capacity as he is as an officer with the corporation.

ORAL RULING OVERRULING MOTION OF RAYMOND J. WISE TO
DISMISS COUNTS ELEVEN AND TWELVE AND SUSTAINING
MOTION FOR BILL OF PARTICULARS

The Court: Gentlemen, I indicated previously what my viewpoint was on these matters.

The motion of defendant Wise to dismiss Counts Eleven and Twelve as to him will be overruled.

The supplemental motion for a bill of particulars of certain allegations of Counts Eleven and Twelve will be sustained in such fashion as we later agree on.

[fol. 79] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Now then, there is one other Bill of Particulars. I don't know whether we have covered it specifically.

Mr. Chadwell: The Supplemental Bill filed by Mr. Wise?

The Court: Yes.

Mr. Chadwell: As I understand, Your Honor granted the Supplemental Bill, but not the request we made previously, and the order made by the Court will be merely on the basis of the Supplemental Bill and nothing beyond.

The Court: I am not sure that I follow you when you refer to the request you made earlier.

[fol. 80] Mr. Chadwell: There were some requests, I believe, in some earlier papers dealing with Paragraphs 11 and 12, but the order, as I understood Your Honor's ruling, the order would be, would direct the Government to answer the particulars requested in the—I don't believe I have it in front of me—

The Court: The only modification of that is as it relates to request No. 2.

Mr. Jinkinson: Is it as to the statute which the defendant—

The Court: Yes, because the Indictment already charges

Section 1 of the Sherman Act. I don't understand by the Bill of Particulars, you could amend the Indictment to that extent, by changing the words.

Mr. Chadwell: I don't think so. Mr. Jinkinson made it very clear in his argument today that they are only charging him under Section 1. I don't think that is important. I am sorry, I don't have a copy of that paper right in front of me. Here it is. I am sorry; I have got it right here.

No,—I don't know what has happened to it—it has gotten away from me. Oh, yes. The order, if agreeable to the Court, will be in the words 1-a and 1-b, and 2 will be omitted.

[fol. 81] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 82] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

BILL OF PARTICULARS—Filed April 8, 1961

Comes now the United States and files this bill of particulars in response to the order of this Court dated March 17, 1961 granting in part the motions of the defendants for a bill of particulars. The Government's bill of particulars to the extent of its present knowledge is as follows:

I

Answer to Paragraph 1(a) and (b)

It is alleged that the defendant Wise is personally charged with actively and directly engaging in the illegal conduct charged in Counts Eleven and Twelve of the indictment. The Government states that the defendant Wise, in actively and directly engaging in the alleged offenses, is alleged to have been acting solely in his capacity as an

officer, director, or agent who authorized, ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been committed by National Dairy Products Corporation of which he was an officer, director, or agent.

[fol: 83]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

RENEWED MOTION OF DEFENDANT RAYMOND J. WISE TO DIS-
MISS COUNTS ELEVEN AND TWELVE AS TO HIM—Filed April
19, 1961

Defendant, Raymond J. Wise, renews his motion for an order dismissing Counts Eleven and Twelve of the Indictment as to him on the ground that said counts, in themselves and as made more specific by Bill of Particulars dated April 10, 1961, filed by the Government, fail to charge him with an offense under Section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1.

In support of said renewed motion to dismiss, defendant Raymond J. Wise offers his attached Suggestions.

Dated: April 19, 1961.

John H. Lashly, John T. Chadwell, Martin J. Purcell,
Richard W. McLaren, Attorneys for Defendant,
Raymond J. Wise.

Of Counsel: Lashly, Lashly & Miller, 705 Olive Street,
St. Louis 1, Missouri, Tel: MAin 1-2939. Snyder, Chadwell,
Keck, Kayser & Ruggles, 135 South LaSalle Street, Chicago
3, Illinois, Tel: RA 6-2545. Morrison, Hecker, Buck &
Cozad, 17th floor, Bryant Building, Kansas City 6, Mis-
souri, Tel: VI 2-5910.

[fol. 84] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

SUGGESTIONS OF DEFENDANT RAYMOND J. WISE IN SUPPORT OF
RENEWED MOTION TO DISMISS COUNTS ELEVEN AND TWELVE
OF THE INDICTMENT AS TO HIM—Filed April 19, 1961

[fol. 85] Argument

A. The Indictment Does Not Charge Defendant Wise with
an Offense under The Sherman Act

The issue between the Government and defendant Wise is clearly drawn. Defendant Wise contends that Section 1 of the Sherman Act applies only to an individual acting for his own personal account, and that where an individual is charged, as he is here, with "acting solely in his capacity as an officer, director, or agent who authorized, ordered or did some of the acts constituting . . . the violations alleged . . .," he must be charged under Section 14 of the Clayton Act. (For the authorities supporting this proposition, this defendant respectfully refers the Court to his Suggestions filed in support of his prior Motion to Dismiss and in support of his Supplemental Motion for Particulars, both dated January 24, 1961).

The Government's position is that it may charge an officer, director or agent with violation of the Sherman Act if, although acting in his representative capacity, he "actively and directly engag[ed] in the illegal conduct charged." But any corporate official who authorizes, orders, or does some of the challenged acts must be deemed to be "actively and directly" engaged in the illegal conduct charged.

[fol. 86] Dated: April 19, 1961.

John H. Lashly, John T. Chadwell, Martin J. Purcell,
Richard W. McLaren, Attorneys for Defendant,
Raymond J. Wise.

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[fol. 87] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI, WESTERN DIVISION

No. 20542

UNITED STATES OF AMERICA, Plaintiff,

vs.

NATIONAL DAIRY PRODUCTS CORPORATION AND RAYMOND J.
WISE, Defendants

MEMORANDUM AND ORDER—June 14, 1961

Several motions filed by defendants are pending for ruling.

I

Defendant Wise has renewed his motion to dismiss Counts 11 and 12 (Section 1, Sherman Act Counts) of the indictment. This motion was submitted earlier and was overruled on March 6, 1961. Leave was given at that time to refile the motion after the Government had filed its bill of particulars.

In the motion defendant contends that he cannot be properly indicted under Section 1 of the Sherman Act, Section 1, Title 15, U.S.C.A., for acts done on behalf of and as a representative of his corporate employer National Dairy Products Corporation, when the acts are alleged to constitute a violation of Section 1 by the corporation. Defendant contends that in such circumstances, he must be indicted under Section 14 of the Clayton Act, Section 24, Title 18, U.S.C.A.

The motion tenders a complicated question as to criminal

liability and responsibility of a corporate officer under the statutory framework of the anti-trust laws. Under cases cited by the parties, it is apparent that much doubt and uncertainty existed prior to the enactment of Section 14 [fol. 88] of the Clayton Act. See, for example, *United States v. McAndrews & Forbes Co.*, 149 F. 823 (S.D. N.Y. 1906); *Union Pacific Coal Co. v. United States*, 173 F. 737 (8th Cir. 1909); *United States v. Swift*, 188 F. 92 N.D. Ill. 1911; *Nash vs. United States*, 229 U.S. 373 (1913).

Since enactment of Section 14, several cases have involved that section, but in none of them have the courts been faced squarely with the issue presented here, namely, whether the Sherman Act or Section 14 of the Clayton Act governs the prosecution of a corporate officer, charged under the anti-trust laws solely because he authorized, ordered or did acts constituting a corporate violation. A number of cases since 1914, the date of enactment of Section 14 of the Clayton Act, have recognized the applicability of that statute where individual defendants as officers having active management, direction and control of the corporation, have been indicted. See *United States vs. Atlantic Commission Company*, 45 F. Supp. 187 (E.D. N.C. 1942); *United States vs. General Motors Corporation*, 26 F. Supp. 353 (N.D. Ind. 1939). See also *Hartford Empire Company vs. United States*, 323 U.S. 386 (1945). In those cases the problem was not, as here, highlighted by the fact that in 1955, Congress raised the fine provided by Section 1 of the Sherman Act while not disturbing the fine provided by Section 14 of the Clayton Act.

Here we have a situation where the principal and an employee are both charged with violation of Section 1 of the Sherman Act. Nothing in the indictment specifically alleged that defendant Wise was acting in an individual capacity, and the broad inference of the indictment was that he acted solely within the scope of Section 14 of the Clayton Act. In that posture a bill of particulars was ordered, and in the bill it was stated that, " * * * the defendant Wise, in actively and directly engaging in the alleged offenses, is alleged to have been acting solely in his capacity as an officer, director, or agent who authorized, [fol. 89] ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been

committed by National Dairy Products Corporation of which he was an officer, director, or agent."

While it is undoubtedly true that a bill of particulars does not occupy the status of an amendment to an indictment, it may be considered in determining ambiguous language; and under those circumstances it seems perfectly clear that the sole issue presented now is whether or not an individual, charged solely in his representative capacity and not in any degree on an individual basis for his own personal account, may be charged with a violation of Section 1 of the Sherman Act.

It is my view that he cannot. There can be no question but that confusion and uncertainty existed prior to 1914 when Section 14 was enacted. Equally, there can be no question but that Congress in enacting Section 14, the "personal guilt" provision, intended to eliminate that uncertainty and confusion. It is clear that since 1914 it constituted no problem until the amendment to the punishment section for Section 1; and the fact that no challenge has been made of the question during that time is of little significance. Under clear Congressional interpretations, the Sherman Act governs the prosecution and punishment of principals, i.e., corporations and individuals acting on their own behalf, while Section 14 of the Clayton Act covers the prosecution and punishment of individuals who, as corporate officials, took part in the corporate violation. This interpretation is supported by the wording and legislative history of Section 14, and is in accord with the fundamental principle that courts are bound to give effect to the various sections of legislation and should avoid a construction which would render a statute a nullity. Any other interpretation would leave Section 14 without content or force.

[fol. 90] The motion of defendant Wise to dismiss Counts 11 and 12 as to him is sustained. Counsel for the Government will prepare appropriate order of dismissal within fifteen (15) days.

II

In view of the ruling on the motion to dismiss, the alternative motion of defendant Wise for severance and separate trial of Counts 11 and 12 is overruled. For the same reason,

the alternative motion of defendant Wise joining in certain additional motions of defendant National is overruled.

III

Defendant National has moved for an order directing compliance with the Court's order of March 17, 1961, requiring particulars. As it relates to the particulars set forth in Part II, 1(b) and 3(d), the motion is overruled. As it relates to Part II, 2 and 3(a), it is my view that the Government has not complied with the order of March 17, 1961, requiring particulars, and the motion is therefore sustained, and the Government is directed to file supplemental particulars within thirty (30) days.

As it relates to Part III, 3(b), the Government has conceded that through inadvertence a portion of the material required was omitted. To the extent of the omitted portion, the motion is ~~therefore sustained~~ as to this part, but as to all other portions of 3(b) of Part III, the motion is overruled.

IV

Defendant National has moved for entry of a pre-trial order with a proposed form of order. This motion is premature and is overruled. At an appropriate time this case will be scheduled for a pre-trial conference and at that time an order will be formulated controlling the issues and the manner of presentation of each party's case.

[fol. 91]

V

Defendant National has moved for an order directing issuance of subpoena duces tecum to certain third parties to be returnable in advance of trial. These motions are sustained and the Clerk is directed at such time as is requested by defendant to issue the subpoenas duces tecum to the parties named in the motion and supplemental motion filed by defendant, to be returnable fifteen (15) days in advance of trial in accordance with the motions.

VI

Defendant National has moved, purportedly under Rule 17(c), for the production of certain documents not obtained

by the Government by process but which were presented to the grand jury or which are to be offered in evidence upon the trial.

This motion is overruled. Undoubtedly this goes beyond the scope of permissible discovery in criminal cases. Under certain sharply restricted circumstances, in the interests of justice, it is sometimes necessary to disclose evidence that has been presented to a grand jury but no good cause is shown here.

It is so Ordered.

R. Jasper Smith, District Judge.

Kansas City, Missouri, June 14, 1961.

[fol. 92] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI, WESTERN DIVISION

Criminal Action No. 20542

UNITED STATES OF AMERICA,

v.

NATIONAL DAIRY PRODUCTS CORPORATION AND RAYMOND J.
Wise, Defendants

ORDER DISMISSING COUNTS ELEVEN AND TWELVE AS TO THE
DEFENDANT RAYMOND J. WISE—August 10, 1961

Upon the renewed motion of the defendant Raymond J. Wise to dismiss Counts Eleven and Twelve of the indictment as to him, and the Court having considered such motion, together with briefs filed in support thereof and in opposition thereto, and having considered the indictment and bills of particulars filed by the United States of America, and the Court being fully advised in the premises, Finds and Holds:

That the defendant Wise is alleged to have been acting solely in his capacity as an officer, director, or agent who

authorized, ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been committed by defendant National Dairy Products Corporation of which he was an officer, director, or agent; that accordingly he cannot be charged on the basis of such acts with a violation of Section 1 of the Sherman Act, and since [fol. 93] the Government charges him and represents that it intends to charge him only under Section 1 of the Sherman Act in Counts Eleven and Twelve of the indictment, his renewed motion to dismiss said counts should be and hereby is sustained.

It is, Therefore, Ordered that Counts Eleven and Twelve of the above entitled indictment be and they hereby are dismissed as to the individual defendant Raymond J. Wise.

Enter:

R. Jasper Smith, United States District Judge.

Dated: August 10, 1961.

[fol. 94] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED
STATES—Filed August 14, 1961

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the order entered in this action on August 10, 1961, dismissing counts 11 and 12 of the indictment, insofar as they charged defendant Raymond J. Wise with violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the

Supreme Court of the United States and include in said transcript the following:

A. The Indictment.

B. Motion of Defendant Raymond J. Wise to Dismiss Count Thirteen of the Indictment, to Strike Certain Material From the Indictment and For Particulars of Certain Allegations of the Indictment, dated January 22, 1960.

C. Motion of Defendant, Raymond J. Wise for Leave to File Supplemental Motion for Bill of Particulars and Motion to Dismiss Counts 11 and 12 of the Indictment as to Him dated August 19, 1960.

D. Order of March 17, 1961.

E. Transcript of Proceedings, March 6, 1961.

F. Renewed Motion of Defendant, Raymond J. Wise to Dismiss counts 11 and 12 of the Indictment as to Him, dated April 19, 1961.

G. Memorandum and Order entered June 14, 1961, dismissing counts 11 and 12 of the indictment as to defendant Raymond J. Wise.

H. Formal Order of Dismissal entered August 10, 1961.

[fol. 95] III. The following question is presented by this appeal:

Whether the district court properly dismissed an indictment charging that a corporate officer acting in his corporate capacity participated in a combination and conspiracy to violate Section 1 of the Sherman Act, 15 U.S.C. 1, on grounds that the Sherman Act is applicable to individuals only where they are acting in their own behalf and that corporate officers acting in their representative capacity can only be charged with a violation of Section 14 of the Clayton Act, 15 U.S.C. 24.

Earl A. Jinkinson, Chief, Chicago Office, Antitrust
Division, Department of Justice. J. Edward Mann,
Robert L. Eisen, Attorney.

[fol. 96] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—December 18, 1961

Appeal from the United States District Court for the Western District of Missouri.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

December 18, 1961.